

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-7626/6219

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

77-7626

UNITED STATES OF AMERICA, *ex rel* MARSHALL P. SAFIR and MARSHALL P. SAFIR,
Plaintiffs-Appellants,

against

AMERICAN EXPORT LINES, INC., *et al.*,
Defendants-Appellees.

77-6219

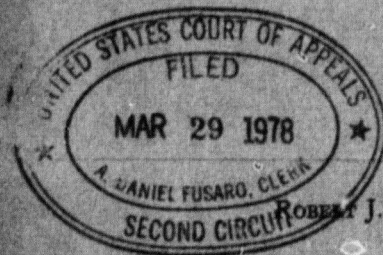
MARSHALL P. SAFIR,

Plaintiff-Appellant,

against

ROBERT J. BLACKWELL and JUANITA KREPS, *et al.*,
Defendants-Appellees,

AMERICAN EXPORT LINES, INC., *et al.*,
Defendants-Appellees.



**BRIEF OF DEFENDANTS-APPELLEES UNITED STATES LINES, INC.,
AMERICAN EXPORT LINES, INC., MOORE-McCORMACK LINES,
INC. AND LYKES BROS. STEAMSHIP COMPANY, INC.**

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**BRIEF OF DEFENDANTS-APPELLEES UNITED STATES
LINES, INC., AMERICAN EXPORT LINES, INC., MOORE-
McCORMACK LINES, INC. AND LYKES BROS. STEAM-
SHIP COMPANY, INC.**

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, which provides that in cases of multiple appellees one appellee may adopt by reference any part of the brief of another, Defendants-Appellees United States Lines, Inc., American Export Lines, Inc., Moore-McCormack Lines, Inc. and Lykes Bros. Steamship Company, Inc. adopt by reference the brief being filed on behalf of the Defendants-Appellees Non-Trade Line Steamship companies on this appeal subject to the following comments.

Statute of Limitations

Pages 28 through 34 of the Non-Trade Lines' brief sets forth their position regarding the defense of the Statute of

Limitations. In the Court below we pointed out that all operating subsidy amounts due the carriers were billed quarterly during the years in which they became payable to the carriers, subject to a five per cent withholding which was payable to the carrier on final audit. In the case of subsidy payments due for 1965 and 1966 voyages, nearly all the amounts of subsidy claimed were billed and paid on vouchers dated and submitted well over ten years ago. The adjustments based on audit results were made continuously from the 1965/1966 period forward, such that after May 24, 1971, there appear only a handful of vouchers filed relating to that period. These apply to only two of the Trade Lines, United States Lines, Inc. and Moore-McCormack Lines, Inc., and would represent only a small fraction of the overall subsidy payments.* Without extensive auditing of records many of which have long since been placed in storage (or possibly destroyed), it cannot be ascertained what portion of the amounts claimed in any given subsidy voucher relate to the eleven-month period of the reduced rates, or to the particular North Atlantic trade route involved.

In view of the fact that Safir filed his complaint in 77 Civil 1093 on May 24, 1977, it is inapplicable to any alleged false claims filed by the defendants herein prior to May 24, 1971, by virtue of the six year period of limitations contained in 31 U.S.C. § 235.

We suggested that even if the final vouchers in the case of any company were filed within six years of the date of Mr. Safir's suit, the Lines should not be put to the expense in this

* In the case of Lykes Bros. Steamship Co., the final subsidy voucher for the period 1965/1966 was submitted on October 19, 1970, and the claims asserted by plaintiff herein in respect of Lykes are clearly barred by the jurisdictional time limitations of 31 U.S.C. § 235.

In the case of American Export Lines, Inc., the final subsidy voucher for the period 1965/1966 was submitted on January 25, 1971 and the claims asserted herein in respect of American Export would be similarly barred.

proceeding of exhuming their financial records of twelve years ago to extract the relevant figures, until a determination has been made by the Courts of whether the complaint in 77 Civil 1093 or the proposed amended complaint in 68 Civil 643 state a cause of action.

We urged the Court below to consider that it would be extremely time-consuming and difficult for defendants to search out and isolate those amounts paid on vouchers filed after May 24, 1971 which could possibly relate to the periods in 1965/1966 in which defendants were found to have violated the Merchant Marine Act. For this reason, we suggested that it would be wasteful to proceed with litigation of the limitation issue where the allegations of fraud are so patently insupportable, where nearly all recovery would be jurisdictionally time-barred and where Mr. Safir's untimely presentation clearly consists of information long ago in the possession of the Government or other irrelevant and immaterial information.

Claims For Subsidy Cannot be Found to be False Claims

The only difference between the positions of the Trade and Non-Trade Lines on this point (which is argued in their Brief, pages 37-41) is that the Trade Lines were found after many years of litigation to have violated Section 810 and subsidy forfeitures were imposed upon them.

In the case of the Non-Trade Lines, they have been found to be only in technical "violation" of that Section.

We submit that this distinction does not alter the conclusion that none of the Lines, either Trade or Non-Trade, filed any false claims. The final administrative ruling as to violation of Section 810 did not issue until September 1974 (long after most of the relevant subsidy vouchers were filed) and the matter is still contested and under review in the District of Columbia courts. The mere fact that a dispute exists under a subsidy contract at the time when a voucher is filed, does not render every such claim a false or a fraudu-

lent claim, *ex post facto*, when and if such dispute is later determined against the subsidized line. Payments on account of subsidy, if they should later be found improper, are secured not only by the agreement of the Lines to refund any erroneous payment, but also by the right of set-off against future subsidy due, by performance bond, and by very substantial construction reserve funds accumulated and maintained by the companies which cannot be disbursed except with the joint signature of the Board.

Conclusion

For the reasons given, Mr. Safir's appeal in 77-6219 and 77-7626 should be denied.

Respectfully submitted,

Dated, March 29, 1978

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MARSHALL P. SAPHIR, :

Plaintiff-Appellant, :

- against - :

AMERICAN EXPORT LINES, INC., et al., :

Defendant-Appellees. :

Docket No. 77-7626/6219

CERTIFICATE OF
SERVICE

-----X
WE HEREBY CERTIFY that two copies of the within
brief of defendant-appellees United States Lines, Inc.,
American Export Lines, Inc., Moore-McCormack Lines, Inc.
and Lykes Bros. Steamship Company, Inc. was this date mailed
to the parties on the list attached herein.

Dated: New York, New York
March 29, 1978

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